Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 77-1093

OCTOBER TERM, 1977

ERNEST MALIZIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

ERNEST MALIZIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Ernest Malizia, the petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 3, 1978.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed, without opinion, a judgement of conviction entered on June 15, 1977 in the United States District Court for the Southern District of New York by the Hon. Irving Ben Cooper and the denial of petitioner's post-trial motions on September 19, 1977. (See Appendix, *infra*, for the order of the Court of Appeals and the order denying petitioner's post-trial motions).

JURISDICTION

The judgement of the Court of Appeals for the Second Circuit was entered on January 3, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the courts below err in denying petitioner's motion for a new trial or a remand for a hearing based on violation of the government's policy against dual prosecution?

2. Whether the decisions below denying petitioner's pre-trial motion to represent himself are in conflict with the decision of this Court in *Faretta v. California*, 422 U.S. 806 (1975) and 28 U.S.C. Section 1654?

3. Did the courts below err in denying petitioner's mid-trial motion to proceed *pro se*?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1654

Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT OF FACTS

On June 15, 1977, petitioner was convicted in the United States District for the Southern District of New York of the crime of conspiring to violate the federal narcotics laws in violation of Title 21, U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A), following a jury trial before the Hon. Irving Ben Cooper, U.S.D.J. Petitioner was sentenced to a term of fifteen years imprisonment, consecutive to his other federal terms of imprisonment,* to be followed by six years special parole and a committed $25,000 fine. Petitioner is presently incarcerated.

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, Malizia made a timely motion for an order vacating the judgement entered and for a new trial. This motion was based on two grounds—the denial by the trial court of petitioner's right to self-representation and a claim of selective prosecution due to violation of the government's Petite policy

* On March 19, 1974, Judge Motley, U.S.D.J., imposed a 10 year term of imprisonment and a $20,000 fine to be followed by 3 years special parole on Indictment 74 Cr. 150 (S.D.N.Y.). On May 5, 1977, Judge Werker, U.S.D.J., imposed 5 year sentences on Malizia on Indictment 74 Cr. 1018 (S.D.N.Y.), concurrent with each other, but consecutive to Judge Motley's sentence.

against dual federal-state prosecutions. Judge Cooper denied the motion in a memorandum order entered on September 19, 1977.

On appeal, the judgement of conviction and the denial of the post-trial motions were affirmed without opinion on January 3, 1978.—F.2d—(2d Cir. 1978).

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED UNDER THE COURT'S SUPERVISORY POWER TO CORRECT THE ERRONEOUS DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL, OR A REMAND FOR A HEARING, BASED ON VIOLATION OF THE GOVERNMENT'S POLICY AGAINST DUAL PROSECUTION.

Malizia's post-trial motions charged that he was a victim of selective prosecution due to violation of a Government policy, the details of which Malizia and counsel were then unaware, against dual federal-state prosecutions. The motion requested a hearing to determine the nature of said policy and to determine whether it was violated in Malizia's case. The government, in a response affidavit, explained the terms of the "Petite" policy* and stated that on August 8, 1977, almost 3 months subsequent to Malizia's sentencing, approval was obtained. (See, Appendix, *infra*. Affidavit of Assistant United States Attorney in Opposition to Defendant's Post Trial Motions, dated August 8, 1977).

* Quoting from United States Attorney's Manual, 9-2.142 (1-10-77).

However, no independent documentation of this approval was supplied. And the same affidavit states that approval was first sought on June 24, 1977, three days after the filing of Malizia's post-trial motions. Clearly, the government now concedes that the Petite policy applies to Malizia* and, petitioner submits, the timing and manner of the actions taken to obtain subsequent approval for the prosecution raise serious, unanswered questions as to the prosecution's motives and good faith compliance with its own procedure. The failure of a government agency to follow its own regulations violates due process. *Paul v. United States*, 371 U.S. 235, 255 (1963); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *United States ex rel. Checkman v. Laird*, 469 F2d 773, 780 (2d Cir. 1972). In addition, the government's uneven application of its policy is suggestive of a violation of equal protection standards as they apply to governmental action through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Snowden v. Hughes*, 321 U.S. 1 (1943). Recently, this Court, in *Rinaldi v. United States*, —U.S.—, 22 Cr. L. 4061 (Nov. 9, 1977) (per curiam), vacated a judgement of conviction and remanded the case for dismissal of the indictment, where it was found that violation of this same polcy resulted from prosecutorial misconduct rather than inadvertence. There, the prosecutor misinformed the trial court as to approval for the prosecution and, after conviction, the government moved to dismiss.

* Malizia had already been indicted in New York State court and had pleaded guilty to a charge involving the 1973 sale of narcotics by him and 2 co-conspirators named in the federal indictment. He was sentenced to a term of imprisonment of 6 years to life, concurrent with his federal sentences.

Here, the record shows that prior approval of Malizia's prosecution was never sought nor has there been the necessary showing of "compelling interests of federal law enforcement." 22 Cr. L. at 4063. As the Court said in *Rinaldi*:

> The Petite policy was designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power.

22 Cr. L. at 4063.

Petitioner has requested a remand for a hearing on the government's actions in complying with this policy. In *Rinaldi*, and the cases cited therein, the policy has been discussed in terms of whether proper compliance occurred prior to the federal prosecution. Here, there was no attempt to comply until petitioner filed his post-trial motions. This Court should grant a writ of certiorari under its supervisory power to correct the erroneous denial of Malizia's motion and to conform the ruling below with this Court's rulings concerning this government policy.

THE WRIT SHOULD BE GRANTED AS THE DECISION BELOW DENYING PETITIONER'S MOTION TO REPRESENT HIMSELF IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *FARETTA V. CALIFORNIA*, 422 U.S. 806 (1975) AND 28 U.S.C. §1654

In *Faretta v. California*, 422 U.S. 806 (1975), this Court held that a defendant may voluntarily and intelligently elect to defend himself.*

> The language and spirit of the Sixth Amendment contemplate that Counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists . . . An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

422 U.S. 820-21 (footnote and citations omitted) (emphasis in original).

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* While *Faretta* involved a state proceeding, the ruling is based on a constitutional right and should apply in a federal criminal proceeding. Further, 28 U.S.C. §1654 codifies this right in the federal system. 422 U.S. at 812-813, 818.

Mr. Justice Stewart, speaking for the Court in *Faretta*, justified the resultant tension between the right to counsel and the right to appear *pro se*:

> To force a lawyer on a defendant can only lead him to believe that the law contrives against him.
>
> * * *
>
> Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, *his choice must be honored out of "that respect for the individual which is the lifeblood of the law."*

422 U.S. at 834 (emphasis added). See, *Brown v. Craven*, 424 F. 2d 1166, 1170 (5th Cir. 1970).

Further, it is established as a matter of law in the Second Circuit and others, that the right of a defendant in a criminal case to represent himself is absolute and unqualified if invoked prior to the commencement of trial. *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied sub nom. DeBlasi v. McMann*, 384 U.S. 1007 (1966); *Sapienza v. Vincent*, 534 F.2d 1007, 1010, (2d Cir. 1976); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *Chapman v. United States*, 553 F.2d 886, 893 (5th Cir. 1977).

This means the right to self-representation is timely if asserted before the jury is empaneled. See, *Denno, supra* at 16; *Dougherty, supra* at 1119, 1124;

Chapman, supra at 894. If the right was timely asserted and improperly denied below, as petitioner maintains, this Court should grant the writ of certiorari, reverse the conviction, and remand for a new trial due to denial of a fundamental constitutional right" . . . even if no prejudice to (defendant) were shown to have resulted from the refusal to permit him to act *pro se*." *United States v. Plattner*, 330 F.2d 271, 273 (2d Cir. 1964); See also, *Chapman, supra* at 891.

Prior to the selection of a jury Malizia presented the District Court with a recusal motion and a motion to discharge his court appointed counsel. (Tr. 2-3)* As counsel then stated, "these motions are to disqualify you (the court) and fire me." (See, Appendix, *infra* for petitioner's motion papers and colloquy) The trial court denied both motions immediately. Malizia sought further relief in the Court of Appeals, but this was denied (Docket No. 77-3025).

Malizia's request to dismiss his attorney was both timely and unequivocal. No inference other than the wish to proceed *pro se* can be drawn, as shown by Malizia's specific, subsequent request for different appointed counsel to handle his appeal of the trial court's denial of the recusal motion. (Tr. 78) The circumstances reflect that when Malizia desired counsel, he so stated.

The lesson of *Faretta* is not that any special formula is necessary to claim the right to proceed *pro se*, but rather that a defendant bring to the court's attention, prior to the commencement of the trial, his wish to proceed in his own behalf. The trial court is thereafter only responsible for providing a full and

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* "Tr." refers to pages of the trial transcript.

complete record that the choice was freely and knowingly made. *Faretta, supra* at 835; *Plattner, supra* at 276.

Malizia's motion papers and counsel's statements notified the trial court that Malizia no longer wished to be represented by trial counsel. Further, Malizia's *pro se* motions were at least a signal to the court that defendant was no longer relying on counsel for legal advice and representation, but was now taking on that responsibility, as was his right pursuant to statute and *Faretta.* Finally, there was no request at that time for new counsel or for an adjournment.*

As to timeliness, the Second Circuit, in a prior case on *pro se* representation, could not have been more emphatic:

> We hold that if (the defendants) clearly sought to represent themselves, after their cases had been called on the calendar but before the jury had been chosen, they had an unqualified right to have their requests granted. At this stage there was no danger of disrupting proceedings already in progress.

United States ex. rel. Maldonado v. Denno, supra at

* The government contended Malizia requested hybrid representation, but this is not factually accurate. Malizia requested the assistance of other counsel, either professional or layman, not joint representation. *Faretta* specifically approves of the presence, even over the objection of defendant, of counsel to aid defendant in his self-representation. 422 U.S. at 834 n. 46. Moreover, the Tenth Circuit, in *United States v. Hill,* 526 F.2d 1019, 1024 (10th Cir. 1975) *cert. denied.* 425 U.S. 940 (1976), has held that hybrid representation is a permissible method of representation.

16; See also *Stepp v. Estelle,* 524 F. 2d 447 (5th Cir. 1975); *Chapman, supra* at 894-895.

Thus, the rulings below denying Malizia's motion to represent himself were not in conformity with 28 U.S.C. §1654 and this Court's holding in *Faretta v. California, supra.* A writ of certiorari should issue to correct this error.

THE WRIT SHOULD BE GRANTED UNDER THE COURT'S SUPERVISORY POWER TO CORRECT THE ERRONEOUS DENIAL OF A MID-TRIAL MOTION TO PROCEED *PRO SE*

Assuming that Malizia did not make his motion to proceed *pro se* until after the trial had commenced, the denial of his mid-trial motions by the District Court was improper under the guidelines established by the Second Circuit for determining such requests.

The trial commenced* on April 20, 1977. At several times during these proceedings, Malizia voiced his request to represent himself, but the District Court denied these motions (See, e.g., Tr. 512, 518, 528). Trial counsel then suggested that the court conduct an inquiry into Malizia's request (Tr. 528-29). The District Court did so, and denied Malizia's request to proceed *pro se.* (Tr. 535-58).

The Second Circuit in *United States ex. rel. Maldonado v. Denno, supra,* has established guidelines for such an inquiry. See also, *Sapienza v. Vincent,* 534 F.2d 1007 (2d Cir. 1976).

* Malizia's pre-trial motion was brought before the District Court on April 19, 1977. Jury selection was commenced that date and concluded the following day.

> Once the trial has begun with the defendant represented by counsel . . .(t)here must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress . . .

Denno, supra at 15.

The District Court, though, based its ruling denying his motion on its opinion that granting the motion " . . . would be an overwhelming hindrance to the defendant's best interests." (Tr. 555)

Petitioner submits that this was not the appropriate test, for, as this Court and the Second Circuit have held, the choice of representation is for the defendant alone and the court's only responsibility is to see that the decision is made freely and knowingly. *Faretta, supra* at 834; *Plattner, supra.*

The District Court's decision did not balance the prejudice to defendant's interests (including his right to proceed *pro se*) with the potential for disruption or unnecessary delay. Rather, the court attempted to follow the commendable, but misplaced, desire to assure Malizia a fair trial instead of recognizing that as long as the potential for disruption does not outweigh the prejudice to defendant's interests, the defendant need not make the best choice, as long as it is his choice.

It is petitioner's position that the record below is inadequate to sustain a finding denying his motion under the appropriate standard set forth in *Denno, supra.* There has never been any question by any of the parties to this proceeding as to Malizia's competence or ability to understand the proceedings. He also has sufficient familiarity with courtroom pro-

cedures so as not to unduly hamper the proceedings. *United States v. Trapnell,* 512 F. 2d 10 (9th Cir. 1975). Further, no request for an adjournment or delay was made in connection with his *pro se* requests. The actions by Malizia that might be considered disruptive, in a vacuum, were generated by the trial court's erroneous denial of his previous *pro se* motions, not by intentionally obstructionist misconduct. See, *Faretta, supra* at 835 n. 46, citing *Illinois v. Allen,* 397 U.S. 337 (1969).* "It would be anomalous to hold that the denial of one's rights can be justified by reference to the nature of subsequent complaints protesting that denial." *United States v. Dougherty,* 473 F.2d 1113, 1126-27 (D.C. Cir. 1972). In *Dougherty,* the Court of Appeals for the District of Columbia Circuit held, in reversing a conviction for denial of the statutory right to appear *pro se,* that to allow the use of subsequent incidents concerning the denial to operate as a waiver of this right ". . . is like using the fruit of an unreasonable search to provide a cause making the search reasonable." *Id.* at 1126.

A fundamental constitutional right, such as is involved here, should not be lost where the predicate of the behavior was the improper denial of the right. As this Court has emphasized, one of the most important functions of a criminal trial is to show both society and defendants that justice is done in our courts. *Adams*

**Allen* requires some intent to seriously obstruct or upset the trial proceedings. Some of Malizia's actions noted by the District Court and not directly tied to his *pro se* requests should not be characterized as disruptive under this test. For example, the court admonished Malizia for his facial expressions for fear of prejudicing the jury, but clearly this was not disruptive or obstreperous under the *Allen* test. (Tr. 20-23, 410)

v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). The actions and ruling of the District Court cannot be said to achieve this. Therefore, petitioner requests that the Court grant a writ of certiorari to review the erroneous denial of his mid-trial motion to proceed *pro se*.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

J. JEFFREY WEISENFELD
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of January, one thousand nine hudnred and seventy-eight.

Present:

Hon. William H. Timbers
Hon. Thomas J. Meskill, Circuit Judges
Hon. Morris E. Lasker, District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

Joseph Magnano, a/k/a Joe the Grind, Frank Pallatta, a/k/a Bolot and a/k/a Nose, Richard Bolella, Louis Macchiarola, a/k/a Red Hot, Michael Carbone, Dominic Tufaro, a/k/a Donnie Boy, Frank Ferraro, a/k/a Skooch, Carmine Margiasso, a/k/a Charlie, Anthony DeLutro, a/k/a Tony West, Anthony Soldano, a/k/a Tony, Joseph Malizia, a/k/a Patsy Pontiac, Ernest Malizia, Frank Caravella, John Gwynn, William Chapman, a/k/a Chappy, St. Julian Harrison, Frank Lucas, Gerard Cachoian, a/k/a Coco,

Roberto Rivera, Gabriel Rodriquez, a/k/a Cass, Ernest Malizia,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk

BY ARTHUR HELLER, Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATE OF AMERICA

-against-

ERNEST MALIZIA,

Defendant.

IRVING BEN COOPER, D.J.

Defendant Malizia has moved pursuant to Rule 33 of the Federal Rules of Criminal Procedure for an order vacating and setting aside the judgment entered against him and granting a new trial. For the reasons set forth below, the motion is denied in its entirety.

Following a jury trial of eleven days, defendant was found guilty of conspiring to distribute narcotic drug controlled substances in violation of Title 21, U.S.C. Secs. 812, 841(a)(1) and 841(b)(1)(A). On June 15, 1977, we sentenced Malizia to 15 years imprisonment to run consecutively with any other sentences imposed upon him anywhere prior to that date,[1] and in addition a $25,000 committed fine; we included special parole of six (6) years.

The proof at trial revealed defendant to be an active member of an involved heroin distribution network in the

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1. Malizia had previously been sentenced by Judge Motley in March, 1974 to ten years upon a conviction for possession and distribution of cocaine. Further, he was on May 24, 1977 sentenced to five years (consecutively) by Judge Werker upon a guilty plea for escape from federal detention.

New York metropolitan area during 1973-74. He was a middle-man in this massive conspiracy to distribute heroin in return for hundreds of thousands of dollars in cash. As we stated at the time sentence was imposed:

> We have presided over trials involving the sale of substantial quantities of narcotics. Never, however, on a scale as extraordinary as this with its enormous quantities of heroin bought and sold on an almost daily basis. The activities of this group emphasize the overlords and regimental tiers of operation, all governed by tight maneuvers and bold enough to successfully avoid governmental detection of which they were constantly apprehensive and aware. Nor have the important operational details of their cruel enterprise come to light even at this late date.
>
> Let's face it. So inhuman, ruthless and cold blooded was their approach to the execution of their nefarious schemes that we sat agast at the unfolding of the enormity of their horrifying indifference to life's values.
>
> The holocaust of misery, the dreadful terminus of life for legions following the vast narcotic operations revealed herein too horrifying even to contemplate. [*U.S.A. v. Malizia,* sentencing minutes at pp. 46-47, June 15, 1977]

Defendant's instant motion is promised on two grounds: selective prosecution and denial of his right of self-representation. As readily appears, both grounds are without merit.

In *United States v. Berrios,* 501 F. 2d 1207, 1211 (2d Cir. 1974), our Circuit had occasion to examine the issue of

selective or discriminatory prosecution:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Defense counsel asserts that "defendant has been a victim of selective and discriminatory prosecution by the United States Attorney for the Southern District of New York." [Affidavit of J. Jeffrey Weisenfeld, Esq., sworn to June 17, 1977, par. 5]. He further states that "there is a policy of the United States Attorney or the Department of Justice not to prosecute an individual on charges where there has been a prior disposition in a state court or other jurisdiction concerning the same facts or circumstances." [Affid., par. 7]. Accordingly, counsel reasons that from the fact that defendant pleaded guilty to state narcotics charges "involving acts that were a part of the conspiracy . . . herein" [par. 8], he is a victim of selective or discriminatory prosecution. This argument is without merit.

In the first place, we are informed that it is not the policy of either the United States Attorney for the Southern District of New York or of the Department of Justice to dispense with prosecution upon a disposition against a defendant in state court on similar charges. [Affidavit of Assistant U.S. Attorney Federico E. Virella, Jr., sworn to

August 8, 1977, pars. 3, 5, 6]. The actual and correct policy statement is that:

> No Federal case should be tried when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling Federal interests for prosecution. No such recommendation may be approved by the Assistant Attorney General without having it first brought to the attention of the Attorney General . . . Note that approval of the action of the United States Attorney subsequent to the dual prosecution constitutes compliance. [United States Attorney Manual, 9-2, 142 (January 10, 1977]

The facts of the present case indicate that the Government did indeed conform with the above-stated policy: Approval for the prosecution of this defendant was sought on June 24, 1977 and the Attorney General and Assistant Attorney General approved the request on August 8, 1977. [Virella affid., par. 5]. Therefore, defendant has failed to satisfy the first requirement of the *Berrios* two-prong test, for no discrimination or selective prosecution has been established.

Furthermore, defendant has offered no evidence that his prosecution was based upon impermissible considerations, i.e., race, religion or the desire to prevent the exercise of constitutional rights. See *United States v. Oaks*, 527 F. 2d 937 (9th Cir. 1975); *United States v. Alimad*, 347 F. Supp. 912 (M.D. Pa. 1972), aff'd *sub. nom., United States v. Berrigan*, 482 F. 2d 171 (3d Cir. 1973). Such an impermissible consideration by the Government is an essential element of a *prima facie* case of selective or discriminatory prosecution. Mere "conscious

exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *United States v. Berrios, supra.*

We find that the Government decision to prosecute Malizia after his guilty plea in state court was not arbitrary or unconstitutional. Over and over again the evidence at trial showed that defendant was a dealer in massive amounts of heroin. His operations were extensive and of long duration, involving a well-established network of suppliers, middlemen and street dealers. Defendant's disrespect for the law, the misery his machinations inflicted upon the public, and his attempts to evade prosecution were all flagrant.[2]

Defendant's next argument to set aside the judgment and for a new trial is based upon the Court's denial of his motion during trial to conduct his own defense. As readily appears this motion is entirely without merit and is denied.

> Title 28 U.S.C. Sec. 1654 provides:
> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

It is well established that the right of a defendant in a criminal case to represent himself is unqualified if invoked prior to the commencement of trial. *United States ex rel.*

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2. Two particular instances bear mention here. First, Malizia escaped from federal custody in September 1974 in a successful plan which included the bribing of a priest and a prison guard. Malizia pled guilty before Judge Werker of this Court (74 Cr. 1018) and was sentenced to five years to run consecutively with the ten year sentence previously imposed by Judge Motley. Second, Malizia was found guilty after a trial to the Court (Pollack, J.) (77 Cr. 402) on a charge of assault on a federal reservation: on May 2, 1977 he had viciously attacked his lawyer during his trial before us.

Maldonado v. Denno, 348 F. 2d 12, 15 (2d Cir. 1965); see also, *United States v. Plattner*, 330 F. 2d 271, 273 (2d Cir. 1964); *United States v. Bentvena*, 319 F. 2d 916, 938 (2d Cir.), *cert. denied, Ormento v. United States*, 375 U.S. 940 (1963).

In the present case, however, the request by Malizia to represent himself occurred *after* the trial had commenced; indeed, defendant moved on the fourth day of trial. [Tr.[3] 518] Accordingly, the appropriate rule on the question of a criminal defendant's right of self-representation upon motion made after the commencement of trial is that enunciated in *United States ex rel. Maldonado v. Denno, supra* (at 15):

> Once the trial has begun with the defendant represented by counsel . . . *his right thereafter to discharge his lawyer, and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress,* with considerable weight being given to the trial judg's assessment of this balance. (emphasis added)

defendant argues that "the choice of representation is for the defendant personally." [Weisenfeld affid., Sec. 15] *Faretta v. California*, 422 U.S. 806 (1975). On the facts presented herein, defendant's reliance upon *Faretta v. California, supra*, is misplaced. As the Second Circuit noted recently: "The recent Supreme Court decision, *Faretta v. California*, . . . casts no pall on our *Maldonado* ruling. *Faretta does not involve motions made after the commencement of trial . . .*" *Sapienza v. Vincent*, 534 F. 2d 1007, 1010 (2d Cir. 1976) (emphasis added). Thus,

3. "Tr. ' followed by a number indicates a citation to the official trial transcript.

Faretta v. California, which expresses a defendant's absolute right of self-representation on motion made prior to trial is inapposite here.

Confronted with defendant's mid-trial request to represent himself (Tr. 512), we were duty bound, and did, conduct an extensive hearing to determine whether "the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress . . ." *United States ex rel. Maldonado v. Denno, supra* at 15. Defendant contends that the hearing "was insufficient and the decision improper as a matter of law." [Weisenfeld affid., Sec. 15] We disagree.

After conducting a full and complete hearing into defendant's background, education and employment experience (Tr. 546-47), we found that defendant was ignorant, offensive in manner and deportment and incapable of pursuing his own defense without severely prejudicing himself; that defendant's conduct throughout the trial was deliberately disruptive; that the attempt to dismiss his counsel was merely a tactic to manipulate the record for purposes of appeal; that counsel was an able, resourceful and determined representative of defendant. [Tr. 553-57].

We find that the hearing on defendant's mid-trial motion to represent himself was complete and adequate to protect his constitutional rights, and in conformity with prior decisions of this Circuit. See *United States ex rel. Maldonado v. Denno, supra*. There is sufficient basis in the trial record to establish that the prejudice to defendant's interests which would have occurred if he were allowed to represent himself outweighed his *qualified right* so to do. *Id.* The denial of defendant's mid-trial motion to represent himself was a proper exercise of judicial discretion which we will not disturb.

Defendant's motion is denied in its entirety.
SO ORDERED:

IRVING BEN COOPER
United States District Judge

New York, N.Y.
September 19, 1977

APPENDIX C

5. The essence, however, of Malizia's claim is that the Government violated its own policy not to prosecute an individual on charges where there has been a prior disposition in a state court . . . concerning the same facts or circumstances. Malizia's view as to the actual content of the policy is erroneous. The correct policy statement is that: "No Federal case should be tried when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling Federal interests for prosecution. No such recommendation may be approved by the Assistant Attorney General without having it first brought to attention of the Attorney General . . . Not that approval of the action of the United States Attorney subsequent to the dual prosecution constitutes compliance." United States Attorney's Manual, 9-2.142 (1-10-77).

6. On June 24, 1977 and pursuant to the provisions of the aforementioned policy, this Office requested approval of Malizia's prosecution. Subsequently, on August 8, 1977 the undersigned was informed by Walter Fiederowicz, Associate Deputy Attorney General and Donald Gehring, Esq. of the Department of Justice, Washington, D.C., that the Attorney General and the Assistant Attorney General had approved the federal prosecution of this defendant. Accordingly, in light of this Office's compliance with the United States Attorney's Manual, 9-2.142 (1-10-77), the defendant's motion should be denied.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATE OF AMERICA

v.

ERNEST MALIZIA

TO: Office of the U. S. Attorney
U.S. Courthouse
Foley Square, N.Y., N.Y. 10007

SIR:

PLEASE TAKE NOTICE that on April 14, 1977, at 9:00 o'clock A.M. or as soon thereafter in the forenoon as I can be heard, defendant Ernest Malizia, by his own person will move before this court for the disqualification and/or recusal of the trial judge pursuant to 28 U.S.C. Sections 144 and 455.

A brief in support of this motion is enclosed. Also enclosed are an affidavit of the defendant in the above captioned matter. Further also it will be requested by the defendant acting in propria persona that his attorney of record be likewise be entirely dismissed from participating any further in my defense.

ERNEST MALIZIA
Metropolitan Correctional Center
150 Park Row
New York, N.Y. 10007
Dated: April 12, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

ERNEST MALIZIA

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK SS:

Ernest Malizia, under his own oath, hereby deposes and says:

1. I am the defendant in the above captioned matter.

2. On March 31, 1977, I was informed by my court appointed counsel, Joseph I. Stone, Esq., of the following conversation or "deal" that transpired in the Chambers of the Hon. Irving Ben Cooper, Chief U.S.D.J., Southern District of New York:

3. Counsel aforementioned, Stone, Esq., made me aware that in conversation with Judge Cooper the latter proposed to him, in order that such proposition were transmitted to me, that in case that I were interested and accepting his (the Judge's suggestion) he (the Judge) would give me the opportunity of having a sentence of twelve (12) years altogether in this instant case at bar consolidated with the escape case now being pending against me in this same jurisdiction and currently being handled by another attorney, irving Cohen, Esq., and which case is also being ventilated at this very same Federal District, with the condition that in case I were accepting such plea

bargaining coming directly from him (trial Judge Cooper) that it would be stipulated that such sentence was to be consecutively to an already imposed sentence of ten (10) years actually I am serving. Witnesses to such telephone conversation Messrs. Michael Gardner and Jerry Gerardi.

ERNEST MALIZIA
Metropolitan Correctional Center
150 Park Row
New York, N.Y. 10007

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

ERNEST MALIZIA

BRIEF OF DEFENDANT IN SUPPORT OF MOTION FOR DISQUALIFICATION OF THE TRIAL JUDGE AND DISMISSAL OF THE ATTORNEY OF RECORD

STATEMENT OF FACTS

The facts in this case are brief, concise, and circumscribed themselves to a particular telephone conversation that took place on the March 31, 1977, between my court appointed counsel of record in this insant matter and myself and which telephone conversation was heard with my permission by Messrs. Michael Gardner and Jerry Gerardi at present inmates of the Metropolitan Correctional Center, 150 Park Row, New York, N.Y. 10007.

ARGUMENT

To me, as a defendant in this instant matter, it seems highly unusual and questionable that the Hon. Judge Cooper, Chief Judge at this Federal District, to engage himself in practices that from its offset are tantamount to and tainted by bias and prejudice.

If in fact the conversation hereby alleged that took part between Judge Cooper and court appointed attorney Stone Esq., then that is going to be in plain view that Judge Cooper is going to be unable to act himself in this case as an impartial and just arbiter, which would call for his immediate recusal and/or disqualification to preside any further in this case, as well as for the court appointed counsel, Stone, Esq., to also disqualify himself from this case since he is the one that by representing me he had engaged himself on an unlawful plea bargaining which is entirely on my detriment since as an advocate he should know better than to allow, without protest made, a proceeding to continue whereby the judger of facts implicitly, and before trial of the facts at hand, is finding me guilty when he adventured to offer to me such proposition through my court appointed attorney Stone, Esq.

As a substantiation to my allegations of the telephone conversation that took place between court appointed attorney Stone Esq., and myself on March 31, 1977, we have witnesses on the person (s) of Messrs. Michael Gardner and Jerry Gerardi, at present inmates at the Metropolitan Correctional Center, 150 Park Row, New York, N.Y. 10007.

Without margin for error it can be argued at this point in time that court appointed counsel, Stone, Esq., is grossly and inefficiently and inadequately representing me inasmuch of his steadfast refusal to subpoena witnesses in my behalf that most conclusively could establish my innocence in this indictment at hand thus as of his refusal to request from the prosecution to produce an entire true and accurate copy and/or reproduction of certain tape or tapes in which allegedly I had made some statements in regards to this case at bar.

Wherefore, for the reasons stated herein it is mot energetically requested that the Judge presiding at this

proceeding, Hon. Irving Ben Cooper, recuse and disqualify himself from any further intervention in connection with this matter at hand and that also court appointed counsel, Irving I. Stone, Esq., be dismissed by this court, in the best interest of justice, from participating any further in my defense.

Dated: April 13, 1977.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

ERNEST MALIZIA,

Defendant.

Before:

HON. IRVING BEN COOPER, District Judge and a jury

New York, April 19, 1977 2:00 p.m.

APPEARANCES

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York,

BY:
FEDERICO E. VIRELLA, JR., Esq.,
DIANA HELLER, Esq.,
Assistant United States Attorneys

JOSEPH I. STONE, Esq.,
Attorney for Defendant.

(Jury panel present.)

THE CLERK: United States of America v. Ernest Malizia.

Is the government ready?

MR. VIRELLA: The government is ready.

THE CLERK: Is the defendant ready?

MR. STONE: The defendant is ready, your Honor, but I think it would be incumbent upon all parties to have a conference in chambers before we proceed.

THE COURT: Will you keep your seats, ladies and gentlemen? There is something counsel has to say that I want to hear in chambers.

(In the robing room.)

MR. STONE: Your Honor, about eight minutes ago Mr. Malizia was brought into the courtroom. At that time he handed me copies of a notice of motion for a writ of habeas corpus ad testificandum. One copy of the notice of motion I gave to Mr. Virella and I hand the Court one copy of the notice of motion. I think in the interests of seeing Mr. Malizia's wishes are placed on the record it would be in the best interests that he be brought in here.

These motions are to disqualify you and to fire me.

THE COURT: I don't understand this. Who prepared this for him?

MR. STONE: I don't know, your Honor.

THE COURT: Did you convey to him the material that he recites as coming from me?

MR. STONE: Your Honor, Mr. Malizia called me and asked me to prepare certain papers and I told him it was not the exact issue and those were not the facts and I would not prepare them on the basis of what he suggested.

THE COURT: What do you propose I do?

I presume, Mr. Virella, that you have already read this. I'm just glancing at it and I get the impression that he is drawing upon a conversation that we had in answer to Mr. Stone's question when he said: Won't you say

something as to what may very well come out of this by way of a sentence?

And then we said distinctly that we could not make any promises whatsoever.

MR. VIRELLA: That is correct.

THE COURT: Do you remember that, Mr. Stone?

MR. STONE: I remember that and I conveyed that, your Honor, to the defendant. I gave him my opinion.

He asked me, in turn, to convey to your chambers that if you would emphatically state on the record that you would give him no more than ten years he would accept the plea.

Your chambers called me and said it would be against the law to make any promises of any kind to the defendant.

THE COURT: Thank you.

It is quite clear to me that the papers have come to you and that you as the lawyer felt it proper to call it to the attention of the Court and the Assistant United States Attorney.

Your next suggestion is that Mr. Malizia be brought in here right now and that is also valid, so may I ask you to be good enough to have the marshal bring the defendant in, Mr. Clerk.

(Defendant present in the robing room.)

THE COURT: Did you prepare these papers?

THE DEFENDANT: Yes, sir.

THE COURT: Where did you prepare them?

THE DEFENDANT: In MCC.

THE COURT: What do you want to say in support of them? Your lawyer said you wanted to be heard orally in support of them. What do you wish to say?

THE DEFENDANT: I want to submit the papers.

THE COURT: What else do you want to say?

THE DEFENDANT: That is all.

THE COURT: Does the government wish to say anything?

MR. VIRELLA: We would oppose this motion. Though we are taken by surprise by the late hour at which this motion is served, and the fact that Mr. Malizia's motion is not reported utilizing the standard legal procedure that is set out by the statute that he has to make certain allegations of facts concerning any particular affidavit that he has filed, based on a quick reading of this he has not set forth anything that is fact. It is simply just an allegation based on conclusory terms and that would not be sufficient to support this particular motion.

THE COURT: As you read the affidavit of Malizia verified the 12th day of April, 1977, do you find that the substantial allegations there are true or false?

MR. VIRELLA: Absolutely false, your Honor.

THE COURT: I brand them as unmitigated falsehoods. The motion is denied.

THE DEFENDANT: I would like to appeal that.

THE COURT: You will do whatever you wish. The paper will be marked as an exhibit and be made a part of the trial record.

Thank you, marshal.

(The defendant left the robing room.)

MR. STONE: Your Honor, I make an application to start trial at 11 o'clock on Wednesday, Thursday and Friday for the following reasons:

I have just received notice that I have an arraignment tomorrow in Queens and I can't get any other lawyer to handle the matter.

THE COURT: Is the defendant incarcerated?

MR. STONE: No, he is not, but I can't reach him and he has notice also. If I could have one of your law clerks call the Court, I'm sure I'll be here by 10:30 or a quarter to 11.

THE COURT: Your application is granted, but you must be sure to remind my office so that they inform the Judge out in Queens.

MR. STONE: On Thursday, your Honor. I have a homicide sentence. I must at least go and advise the Judge to find out whether he wants to adjourn. There is co-counsel and a lot of security involved. I will contact them immediately. That is Judge Scott in

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